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CIVIL LIBERTY IN WAR TIME

PAPER

PRESENTED AT THE FORTY-SECOND ANNUAL MEETING
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By

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CIVIL LIBERTY IN WAR TIME.

In discussing this topic the writer will confine himself to observations drawn from experience as head of the War Emergency Division of the Department of Justice and, therefore, will enter into no discussion of the topic as affected by the work of the Alien Property Custodian or the activities of the Postmaster General. Within these limitations it gives me pleasure as a member of this association to discuss with fellow lawyers the administration of civil law by Federal authorities during the time that we have been at war; for the record of law enforcement and of the promulgation of policies in this field is one made entirely by lawyers.

With the perspective of years no achievement of the Americans in the war will loom larger or more significant than the triumph of American civil law, the lack of internal disorder and the law-respecting attitude observed throughout the country by both citizen and alien alike. No other nation came through the struggle with so little disorder and with so little interference with the civil liberty of the individual. How much this was due to our remoteness from the fields of warfare, how much it was due to the instinctive habits of our people, and how much it was due to respect for punitive law are now matters of conjecture. It is for the future to ascertain accurately the explanation; but no historical appraisement will leave out of its reckoning consideration of the attitude of Attorney General Gregory and his department. There is no other department of the Government whose activities during the war have more nearly affected the life and habits of the citizen; none has been so fully responsible for the protection of the constitutional and civil rights of the citizen—and, it may be added in passing, no other department has received such a plenitude of advice from the citizen.

It was apparent at the outset that the processes of the civil law, framed for administration in peace times and under normal conditions, would necessarily be viewed with impatience and discontent in times of passion and excitement; and it was evident in the light of past experience that efficient administration of the civil law was the only alternative to rule by military tribunals in case conditions of general disorder should at any time arise. Early in the war certain principles were definitely decided upon. Those principles were adhered to by the Department of Justice throughout the war and the policy formulated at the beginning remained unchanged to the end. This policy was based upon the confidence felt in the law-abiding character of our citizens and the conviction that in this country it was very generally recognized that liberty meant obedience to law, self-control and self-restraint; and that in every part of the country the

strongest deterrent influence against disloyalty was neighborhood public opinion. It was the view of the department, therefore, that there should be no repression of political agitation unless of a character directly affecting the safety of the State; that the constitutional guaranties protecting life and property must be strictly enforced, and that under no circumstances should the military or naval authorities be permitted to do any act which would arbitrarily interfere with the life and habits of the individual citizens. And, further, that protection of the innocent was at all times a correlative duty with punishment of the guilty.

The American Government entered the war with substantially no law on the statute books affecting the conduct of the individual except the treason statute, which proved well-nigh useless, and the internment statute, which affected only alien enemies. Not only is this true, but during our entire participation in the war Congress, except for the selective-service act, passed only four short statutes which in any substantial way affected the conduct of the individual. The original espionage act as presented by the Department of Justice prior to the declaration of war was not adopted until June 15, 1917, at which time it became a law in a somewhat modified form; and no amendment was made to it for 11 months. The sabotage act, punishing interference with the manufacture of war munitions, although presented to Congress upon our entry into the war and almost immediately passed by the Senate, did not become a law for 14 months; and the so-called passport law, aimed to control the frontiers against spy activities, recommended to Congress by the President in December, 1917, did not become a law until May, 1918. These instances are cited not as instances of culpable delay on the part of Congress, but to emphasize the fact that the Department of Justice throughout the war had limited powers and, during the first year of the war, entirely inadequate powers.

In striking contrast to our situation was that of the British Empire. Within a few weeks after the outbreak of the great war, Parliament enacted the Defense of the Realm act, prepared in advance by a committee of experts. The outstanding feature of this act was to vest executive powers of the largest scope in certain civil officials, so that an entire code of both substantive and administrative law was early promulgated and enforced throughout the war, with such changes from month to month as conditions made advisable. In addition to the lack of adequate war statutes here early in the war, another defect in our law administration came from the fact that prior to our entry into the war the few statutes aimed to prevent breaches of neutrality were most inadequate. In cases arising under these statutes, which came on for trial after we had entered the war, even where the maximum penalty was inflicted, the public were justly critical and discontented with what seemed to them to be a miscarriage of justice. On several occasions offenders were prosecuted and convicted under the provisions of the Sherman Anti-Trust Act because no other statute could be found with which to reach their activities.

In short, on the law side, this country, prior to our entry into the war, had on the statute books almost no protection against hostile activities, and throughout a great part of our own period of war

had inadequate protection against the activity of hostile propagandists. The confidence of the public, which is at all times essential for the orderly administration of justice, was seriously affected by this condition of the statute law. But there were other contributing causes as well which greatly intensified this situation, caused dissatisfaction with civil procedure, and at times imperiled the maintenance of public confidence. Of these causes, the chief was, of course, the universal prevalence of war emotion, which naturally intensified with the progress of the war.

Curiously, one of the chief embarrassments caused by this general condition was the spy mania. Throughout the country a number of large organizations and societies were created for the purpose of suppressing sedition. All of them were the outgrowth of good motives and manned by a high type of citizens. The membership of these associations ran into the hundreds of thousands. One of them carried full page advertisements in leading papers from the Atlantic to the Pacific, offering in substance to make every man a spy chaser on the payment of a dollar membership fee.[1] These associations did much good in awakening the public to the danger of insidious propaganda, but no other one cause contributed so much to the oppression of innocent men as the systematic and indiscriminate agitation against what was claimed to be an all-pervasive system of German espionage. One unpleasant fact continually impressed on my associates and myself was the insistent desire of a very large number of highly intelligent men and women to become arms of the Secret Service and to devote their entire time to the patriotic purpose of pursuing spies. This army of volunteer unofficial spy chasers stands in contrast to the enormous army of civilian volunteers who patiently and unostentatiously devoted their full energies to the constructive work of aiding their country by helping in the Red Cross, the war charities, and many other branches of war activity. For obvious reasons it was impossible for those in authority to make at any time a statement as to the probable extent of the spy system maintained in this country by our enemies. It is still too early to disclose the truth on that subject. Nevertheless, it may be now said, without detriment to the public interest, that any suggestion that the central governments had an organization of 200,000 spies in this country is nonsense.

One other aspect of this agitation is perhaps of more interest to the psychologist than to the student of civil rights, namely, the large number of false stories of enemy activities within the United States,

[1] The same phenomena, in a more aggravated form, characterized the last decade of the eighteenth century in England immediately following the events of the French Revolution.

"Another agency was evoked by the spirit of the times, dangerous to the liberty of the press and to the security of domestic life. Voluntary societies were established in London and throughout the country for the purpose of aiding the executive Government in the discovery and punishment of seditious writing or language. * * * These societies, supported by large subscriptions, were busy in collecting evidence of seditious designs, often consisting of anonymous letters, often of the report of informers, liberally rewarded for their activity. They became, as it were, public prosecutors, supplying the Government with proof of supposed offenses and quickening its zeal in the prosecution of offenders. Every unguarded word at the club, the market place, or the tavern was reported to these credulous alarmists and noted as evidence of disaffection.

"Such associations were repugnant to the policy of our laws, by which the Crown is enarmed with the office of bringing offenders to justice, while the people, represented by juries, are to judge without favor or prejudice of their guilt or innocence. But here the people were invited to make common cause with the Crown against offenders, to collect the evidence, and prejudge the guilt. How, then, could members of these societies assist in the pure administration of justice as jurymen and justices of the peace? In the country especially was justice liable to be warped." (May's Constitutional History, vol. 2, pp. 36, 37.)

put forth through the medium of press dispatches, pamphlets of patriotic societies, and occasionally speeches on the floor of Congress. A phantom ship sailed into our harbors with gold from the Bolsheviki with which to corrupt the country; another phantom ship was found carrying ammunition from one of our harbors to Germany; submarine captains landed on our coasts, went to the theater, and spread influenza germs; a new species of pigeon, thought to be German, was shot in Michigan; mysterious aeroplanes floated over Kansas at night, etc. Then there were the alleged spies themselves—Spoermann, alleged intimate of Bernstorff, landed on our coasts by the *U–53*, administrator of large funds, caught spying in our camps, who turned out to be a plumber from Baltimore. Several other alleged spies caught on the beaches signaling to submarines were subsequently released because they were in the several cases honest men, one of whom had been changing an incandescent light bulb in his hotel room, another of whom was trying to attract the attention of a passer-by on the beach, etc. There was no community in the country so small that it did not produce a complaint because of failure to intern or execute at least one alleged German spy.[1] These instances are cited not to make light of the danger of hostile activities, nor to imply that incessant vigilance was not necessary in watching the German activities, but to show how impossible it was to check that kind of war hysteria and war excitement which found expression in impatience with the civil courts and the oft-recurring and false statement that this Government showed undue leniency toward enemies within our gates.

In no field was this temper more evident than in the attitude created by these unofficial organizations toward unnaturalized Germans and Austro-Hungarians throughout the country. Early in the war these people were naturally regarded by the public as the largest potential element of danger in this country. The expression "alien enemy," used in the old internment statute of 1798 to describe these unnaturalized residents, in and of itself carried the impression of hostility to this country. Thousands of intelligent citizens and some important newspapers continually advocated the internment indiscriminately of all alien enemies, and no amount of statistics on their loyalty or of good conduct on the part of this large class of persons seemed to have the effect of lessening the agitation. They were under suspicion by the majority of their neighbors in every community; they were the subject of incessant investigation at the hands of police officials and amateur detectives, and the extent to which their normal lives were interfered with can only be a matter of conjecture.

No other policy so clearly and sharply differentiates America from the other nations at war as the attitude which it took on the subject of interning enemy aliens. It was a policy not fully understood, and in the earlier period was freely criticized; but I venture to say that of all of the policies advanced by this Government in the war no other pays a higher tribute to the American ideal of justice, and I believe that the verdict of the future upon this policy will be one of unconditional commendation. For in a time of war, while punishing offenders severely, we found it possible to close our ears

[1] According to a recent press report purporting to give an official statement by the British Government, only 12 spies were executed in Great Britain during the war.

to insensate clamor and to perpetuate the American standards of fair play.

No previous war had presented on a large scale the problem of imprisoning or regulating the conduct of noncombatant civilians of enemy origin. Great Britain embarked in a policy of internment early in the war, and the great disorder which followed the sinking of the *Lusitania* resulted in the ministry interning most of the enemy aliens in the British Isles.[1] Later, in 1918, owing to another intense public agitation on the subject, although it was stated that only about 12,000 were still at large (many of whom were alien enemies only in a technical sense), Parliament was compelled by public sentiment to adopt more stringent measures looking toward the internment of many of these remaining aliens. In France practically all enemy aliens were interned down to the spring of 1918. Both of these nations were in close juxtaposition to the central empires. In both of them the German spy system was thoroughly organized, and it is not for us to discuss or appraise the correctness of their decisions. There is no doubt that this process of internment was a costly one. In addition to the loss to industry the expense of maintaining the large internment camps was a very serious item. Suitable work could be found for only a fraction of the persons interned, and the bulk of them, living in idleness, degenerated physically, mentally, and morally to such an extent that an observer of the conditions in several well maintained foreign internment camps recently stated to the writer that, when released, the inmates of these camps, wherever they might go, would be a social liability and source of danger and permanent detriment to the community.

In America the problem of the alien enemy was different. We had approximately 500,000 unnaturalized Germans and probably between 3,000,000 and 4,000,000 Austro-Hungarians. These persons played a part in essential industries which could not be ignored—the Germans in the skilled trades and the Austro-Hungarians in certain other industries, such as steel manufacture and coal mining, to an extent which made those industries virtually dependent on their labor. Secret instructions from the German foreign office and other information which came into our possession early in the war showed that after the first few months of the war the German foreign office ceased to employ many German citizens in this country in espionage work, but endeavored to employ in this work, for obvious reasons, persons who were either citizens of this country or who belonged to the so called friendly alien classes. During the first three years of the great war our various branches of the Secret Service had been closely watching the activities of the Germans in this country who were seeking to interfere with any aid to the French or British. It

[1] An enormous amount of property damage is said to have resulted from the disorders and riots against Germans throughout England during this period. In 1916 there was a great agitation directed against alien enemies, and in 1918, from the middle of June to the middle of July, a most critical war period, this agitation became almost a menace to public safety. Many meetings were held throughout England under the leadership of prominent men, demanding the indiscriminate internment of all enemy aliens, the meeting in Trafalgar Square being the largest public demonstration there during the war, while simultaneously six meetings were held in Hyde Park to give utterance to this demand. The report of the special committee of the House of Commons dealing with the subject, while recommending more severe repressive measures, stated that to place a wholesale charge of treason against all enemy aliens was unwarranted. About the same time Sir George Cave, in a debate on this subject, assured the House that spies had not been found among subjects of enemy States except during the first few weeks of the war. Nevertheless, owing to the intensity of this agitation, the ministry were compelled to promise a revision of alien exemptions and a more drastic policy of internment for the future.

was in the light of these facts, and particularly because of the data gathered through the channels of the Secret Service, that the Attorney General recommended to the President that certain restrictions of movement and employment be placed upon German aliens generally, but that only those be interned who should be found to be dangerous or a menace to the safety of the country. That policy, promulgated on the day we entered the war, remained in essence unchanged to the end. Its wisdom finds confirmation in the convention which was made between the French and German Governments in April, 1918. Under the terms of this convention the French and German Governments practically abandoned their previous policy of wholesale internment by agreeing to repatriate such aliens as desired to return to the respective countries and to permit certain others to remain under limitation as to residence and surveillance.

The American Government, as stated, embarked upon an entirely different and well-considered policy, for in the first proclamation on the subject, made the day of our entry into the war, the President, in providing a set of restrictions to govern the conduct of German alien enemies and in providing for the internment of the dangerous, added the following important declaration:

"So long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such alien enemies as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

The authority for this and the subsequent proclamations came from the so-called Internment law, passed by Congress in 1798, now embodied in section 4067 of the Revised Statutes, and by Executive order the President conferred upon the Attorney General plenary power to enforce and administer these proclamations. This law was passed by Congress during the period of the excitement caused by the intrigues of Genet and his French associates in this country—at a time when it was supposed that war with France was imminent. The powers conferred by the statute were used to a limited extent by the President during the War of 1812, and in 1817 the statute received judicial construction at the hands of Mr. Justice Bushrod Washington, sitting as circuit judge and reviewing the earlier decision of the Pennsylvania Supreme Court. (1 Peters C. C. 466.) It then passed into a state of obsolescence, remaining unused until April 6, 1917, when the country was made aware of its existence by the announcement of the President's proclamation and the statement that during the night of April 6 a group of the chief dangerous German agents had been quietly apprehended and interned by the action of the Attorney General.

In the light of what we now know it is fair to say that the drastic action thus taken so quietly and promptly, followed quickly by other internments, wrecked the German espionage system and gave it a blow from which it never fully recovered. So far as internal order is concerned, this statute was the most useful of all laws in preserving the safety of the country and preventing enemy activities: its importance can not be exaggerated. In addition to its usefulness as di-

rected against the alien enemy, it was made the foundation for the entire code of administrative law under which prohibited and restricted areas were created throughout the country, the most far-reaching and valuable use being the creation and maintenance of the protected water-front zone system in all towns along the seacoast.[1]

The exercise of the power of internment is an anomaly in American law, the nearest analogy to this power being the statutory procedure provided for the deportation of an alien after hearing, provision for review, etc. The power was extraordinary in character not only because of the absence of statutory procedure, but because of the settled judicial ruling that the exercise of this power was not open to judicial review by habeas corpus or otherwise, except as to the one question of the status of the petitioner. This ruling has been followed in the only three cases which have thus far arisen during the war, the court confining itself to the question of fact as to whether or not the person detained was an alien enemy and therefore subject to the exercise of this power.[2]

It was obvious that in times of great public excitement, with the atmosphere everywhere charged with suspicion and rumors, the exercise of this extraordinary power would be subject to grave abuses unless properly safeguarded. The fact that under the Trading with the Enemy act and the proclamation of February 5, 1918, the jurisdiction of the Alien Property Custodian automatically extended to the property of individuals ordered interned increased the necessity for carefulness.[3] No other law so seriously affected civil liberties and civil rights. On the one hand, it was necessary that this power of internment be used promptly, drastically and relentlessly. On the other hand, with no provision for judicial review, there was always danger of mistake in individual cases. With these considerations in mind the Attorney General devised a system of informal procedure under which presidential warrants for preliminary detention of suspicious persons were issued promptly and liberally in prima facie cases of complaint for cause. With the suspected person once in custody, cases were investigated with the aid of practically all branches of the Secret Service and recommendations were called for from the Federal law officer and special agent of the particular locality as well as from various reviewing law officers in the department at Washington. Over 6,000 cases were submitted to the Attor-

[1] Under this system all persons were prohibited from approaching, without an official pass, any [illegible] of war [illegible] forbidden or overflying the entire seacoast of the United States as well as on tidal navigable rivers. Nine hundred thousand photographs were [illegible] under the supervision of the department, and this system of [illegible] protection extended more than 1,000 miles inland. In 10 seaport the War Department, at our request, cooperated by furnishing armed troops to patrol especially important shipping points.

In connection with this proclamation the department announced that it was the duty of those who owned and operated the facilities of this character in war time to provide additional protection for such properties, and the regulations adopted were based upon the assumption that the [illegible] responsibilities rested upon persons made them co-insurers with the Government against risk of enemy alien activities.

The indirect results of these regulations in promoting efficiency were very great and the general protection of the country in the care of water-front shipping properties was very notable. Under their operation it inured to the financial interest of owners and operators of these facilities to provide physical protection in the way of gates and fences for their property, to reduce the number of exits and entrances, and in general to prevent the presence of loiterers and irresponsible persons." (Report of Attorney General, Dec. 1918, pp. 32-33.)

[2] (Ahrens v. Brady, Carusi v. Clayton, Eisler v. Burning, Newman, J.)

[3] Dealing with the Treaty not the jurisdiction of the Alien Property Custodian extends to all property owned by interned alien enemies. Individual property of interned alien enemies to the value of upward of $2,000,000 has thus far been taken into custody by this official, pursuant to the authority conferred upon him by the proclamation of Feb. 5, 1918.

ney General, in a great number of which the individuals were interned, the remainder being released on parole, under restrictions as to habitat and surveillance. Of the number released on parole less than 1 per cent ever came again under complaint. Although internment cases were treated always as open cases for the reception of further proof, comparatively few individuals, once interned, have subsequently been released.

The curious anomaly in our jurisprudence presented by the exercise of this power is illustated by the attitude of the general public on the subject. To insure its fullest value as a deterrent to hostile activities, it was essential that, so far as possible, particularly during the early part of the war, instances of the exercise of this power should be kept secret. Information in the hands of the Department of Justice proved that this was a correct theory. On the other hand, after the first six months of the war, an enterprising press kept the public fully apprised of every instance of internment, together with guesses as to the cause. Fortunately, most of the most dangerous enemy aliens had been interned during the early period and the original German espionage system, so far as systematically organized, was successfully broken up before this policy of publicity interfered with it.

Whether more or fewer individuals should have been interned depends largely upon one's individual view of the danger to be apprehended from alien enemies. In England and Canada a considerable number of officials were vested with power to intern; in England eight different departments being concerned with the administration of that power. In this country the power was vested solely in the Attorney General, and the reviewing law officer who supervised internments had the advantage of being the law official in closest touch with the operations of the Secret Service.

In the view of the writer the distinctly American policy of interning only dangerous noncombatant civilians of the enemy country under the procedure above described must necessarily have considerable effect in the future in shaping the rules of international law relating to the status and treatment of these persons.[1]

In giving high and well-deserved praise to the military authorities who devised and put into operation the draft machinery, it should not be overlooked that practically the entire administrative work of selecting and raising an army was accomplished through civilian aid. The mere fact that the actual work of selecting the Army was done not by military men but entirely by civilians brought to the support of this drastic statute the whole public opinion of the country.

Not only is this true, but all legal questions arising in the work of selecting and mustering in men were tried and disposed of by civil courts on arguments presented by the civilian Federal law officials, and, more than this, it was the Department of Justice and not the military authorities who did most of the work in apprehending de-

[1] In point of fact, the experience of the Department showed that disloyal utterances and activities were quite as common among naturalized citizens as among alien enemies. Unlike the British Government, we had no special legal procedure provided for the cancellation of their naturalization papers. Resort was had, however, to the fraud section of the existing naturalization act, and a number of cases were brought and successfully carried to a conclusion upon a theory of constructive fraud, i. e., alleging that the subsequent disloyal conduct of the naturalized citizen was evidence that at the time of obtaining naturalization he did not honestly renounce allegiance to the enemy Governments. Following the wide publicity given to several early decisions on both the Atlantic and Pacific coasts under which such naturalization papers were canceled, there was a marked subsidence of these disloyal utterances and activities among naturalized citizens.

serters.[1] This statute had the effect of making practically every family in the land a partner in the great national emprise in behalf of human liberty. It was the great outstanding achievement of the democratic spirit in the war. It is nothing short of amazing, for instance, that in raising an army of approximately 3,000,000 men only about 3,500 were reported to the War Department because they resisted the application of the law as "conscientious objectors," and of these cases nine-tenths were eventually disposed of in a manner satisfactory to the military authorities. There is also another phase of this law to be considered besides its success as a military measure. From its essential character and operation it became the great stabilizing factor on which rested that public opinion which controlled and made effective all of the American activities during the war. No anti-draft propaganda had the slightest chance of success. After the draft act went into active operation the power of the so-called German propaganda rapidly declined and within six months lost all degree of effectiveness. Secret service reports demonstrate this beyond doubt and also show how impossible it was, after the first six months of our participation in the war, for the enemy governments to accomplish anything here in a large way through the operations of spies or secret agents. The operation of the statute cleansed, clarified, and unified public opinion in support of the war and had the cumulative effect of minimizing in the popular mind the effect of all interferences with civil rights and civil liberty.

It is at present problematical how much interference with civil liberties of individuals resulted from the operations of the American Secret Service. The largest division of this service was that organized by the Department of Justice, having as an auxiliary the American Protective League, with memberships scattered throughout the country. Although the remarkable work of the latter organization is worthy of the highest praise, both the Attorney General and the writer are strongly opposed to any system of citizen espionage in peace time, and the organization above mentioned is already in the process of dissolution. It is not premature to say that the work of the American Secret Service was extraordinarily efficient, and a competent foreign observer is probably correct in saying that this country had during the war unquestionably a more efficient and better organized secret service than any other nation in the world. But a service organized in this manner manifestly included a large membership of persons not familiar with criminal procedure and varying widely in individual capabilities and judgment. This characteristic was true not only of the service mentioned, but also in a measure of the membership of the Military and Naval Intelligence forces, both of which were remarkably well officered and intelligently managed. Our difficulties lay not in the supervision of these services, but in the patriotic zeal of many of the subordinates in the field. At times they made mistakes which could not be condoned, as, for instance, on the occasion of the slacker canvass at New York City, where the methods employed were in contravention of specific instructions of the Attorney General.

But in this field again citizens everywhere seemed to understand the object of these activities and good-naturedly submitted to all

[1] Prior to July 1, 1918, the department had located and had inducted into actual military service 2,610 slackers and deserters. The total number so inducted during the whole period of the war was approximately 40,000.

sorts of inquiries about their business and private affairs. It is probable that when the full history of this side of Government activity can be made public the individual cases complained of will prove in general to be cases of annoyance rather than of actual wrong done the individual. Organized espionage on a large scale is at variance with our theories of government and, as I have said, except as a war necessity, was not favored by the Department of Justice.

Although the Attorney General, so far as possible, employed his powers to secure the protection of civil liberties, nearly all cases where outrages were committed against individuals lay outside the scope of Federal jurisdiction. During the various Liberty loan drives, the campaigns for war charities, and the loyalty drives many complaints of ill treatment and coercion were received by the Attorney General from people against whom assessments had been levied by non-legal bodies who fixed and collected subscription quotas. Considering the extent of the country and the extremely patriotic temper of the people, it is perhaps remarkable that greater injustice was not done. Nevertheless some of the instances reported, isolated as they were, were cases of outrageous wrong for which no relief could be afforded by the Federal Government.

It may fairly be said that the one serious gap in law enforcement was this field of wrongs done individuals for which no redress could be given by the Federal Government. The Bisbee deportation case (which had no relation to the war) is the most conspicuous example. As United States Circuit Judge Morrow, in refusing jurisdiction, said:

> The situation is indeed a lamentable one and one greatly to be deplored, but it ought not to influence this court to enlarge a statute to include an offense not within its constitutional authority.

Owing to local conditions of intensive patriotism and the fact that those wronged were often aliens or persons under a cloud of supposed disloyalty, it was difficult for them to secure redress at the hands of their local authorities. The one large outstanding fact which most affected the enforcement of law throughout the war was that the public looked upon the war as the Nation's affair, and not only laymen but the local law officials looked to Washington for the righting of all wrongs, whether they were disloyal utterances, hostile activities, or overzealous patriotic activities. Taken by and large the number of cases of seriously wronged individuals was negligible; but at that, the number was too large. In a constant endeavor to alleviate this situation the Attorney General frequently appealed directly to governors and to local State officials, urging the necessity for resolute compliance with law and for the remedying of individual cases of complaint;[1] and in July, 1918, the President issued

[1] "The Department of Justice is actively engaged in the prevention and detection of disloyal acts and the prosecution of violations of the various war statutes. * * * The department deprecates unjust and unfounded criticism or suspicion of citizens or aliens who are lawabiding and loyal, and certainly it should not come about that by unwarranted suspicion such persons should be caused loss of business, loss of employment, or other loss.

"The Federal statutes punishing seditious acts, malicious destruction of property and other war crimes, and the alien enemy laws and regulations are being and will be rigidly and agressively enforced and the penalties prescribed for their violation imposed without exception, but no possible good will come from any unnecessary hardships or discrimination inflicted by private citizens upon those alien enemies who remain law-abiding and loyal or from any such hardships or discriminations unjustly inflicted upon loyal citizens of the United States." * * * (Open letter of Attorney General to Judge S. H. Howard, of Georgia, May 23, 1918.)

an open appeal to the country deprecating disorder and urging all Americans to aid in bringing their country through the war without dishonor.

Still another cause which from time to time created serious discontent and greatly encouraged, in certain sections of the country, impatience with administration of the civil law, were the local conflicts arising out of the activities of organizations of a semi-political character like the Non-Partisan League and the various Granges, and of other organizations—such as the I. W. W. The Non-Partisan League, as a political factor, was strongest in the two Dakotas and in Minnesota. This league had its origin in a distinct economic grievance, and within the territory in which it was active it was clearly the manifestation of widespread agrarian discontent. Both prior and subsequent to our entry into the war its managers were actively engaged in extending its membership in the States named and in the adjoining States, with the result that bitterness and factional prejudice between them and the representatives of the other political parties steadily increased in intensity. Without entering into the discussion as to the loyalty or disloyalty of some of the early leaders of this movement, it would be unjust to question the patriotism or honesty of the great mass of its membership. The movement is in essence clearly a class movement. Prior to our entry into the war, canvassers of this organization and of some of the State Granges in the far northwest, making their appeal to the farmers, vigorously opposed our entry into the war, painting vividly the horrors of war, the economic advantages to the farmer of keeping out of war, the Christian duty of not killing others, etc. These arguments could not but create a latent attitude of opposition to the war, which remained after our entry into the war, grounded perhaps in pacifism rather than in disloyalty. The attitude of these persons after we entered the war, because of their position prior to that event, made them the subject of attack on every side.

Because of considerations of local politics a most complex and troublesome situation resulted in the States referred to, in which great strain was placed upon those charged with the administration of justice, whether Federal or local officials. It was particularly troublesome to the Federal authorities because of the incessant pleas on the one hand for the protection of these people in the exercise of what they claimed was legitimate political agitation, and, on the other hand, the demands of their political opponents for indiscriminate prosecution. The duty of the Federal officials was to enforce the law, but the great difficulty presented was that of obtaining unprejudiced statements of fact and disentangling fragments of evidence from statements highly colored with partisan emotion. The Attorney General adhered to the policy that the Federal Law Department would insist upon the fundamental doctrine that guilt was personal and would not lend itself to proscribing any class of individuals as a class. Furthermore, the law machinery of the Federal Government is not intended or adapted for the maintenance of local order. In the State of Minnesota, because of what was claimed to be either inadequate Federal law or insufficient Federal administra-

tion, State laws of a sweeping character were passed and enforced with severity. Whether justified or not in adopting this policy of repression, the result of its adoption increased discontent and the most serious cases of alleged interference with civil liberty were reported to the Federal Government from that State. Our view was that, while cases of individual guilt must be prosecuted with severity, class movements can not be controlled or moulded by indictments: arbitrary repression or interference too often adds to their dynamic force. But unfortunately the constructive teachings and arguments of persuasion necessary to deal with movements of this character were not at any time in evidence in these disturbed districts of the country.

The general condition in the grain-producing States was intensified by the traditional hostility of the farmer toward the commercial interests of the cities—a phase of agrarian discontent usually summed up in the claim that the townsmen profited unjustly at the expense of the producers. This steadily showed itself in many rural districts in a form of hostility toward State, county, and local councils of defense which, it was claimed, were usually dominated by business men, the boards of trade, commercial clubs, etc. It is too early to appraise the work of these councils of defense and it would be wrong to attempt to do so by mere generalization. The differences between them were almost as many as the number of the organizations. In connection with floating war loans and decrying disloyal sentiments they performed services of immeasurable value. On the other hand, representing as they did the most intense spirit of local patriotism, they interfered with the civil rights of many people, and evidences were not wanting that in occasional cases their interference with civil rights and civil liberties resulted in serious wrongs. The very fact of their being in existence made them listening posts for rumor mongers as well as for legitimate complaint. For example, one Federal law officer of the Middle West recently informed the writer that he had received approximately 3,000 complaints from local councils of defense in his territory out of which less than 100 were worthy of serious attention. Some of them provoked grave discontent, the effects of which can not now be estimated, because of the manner in which, without legal authority, they arbitrarily assessed, against members of their respective communities, demand quotas for liberty loans, Red Cross, and other war charities. While many isolated cases of coercion and wrong were brought to the attention of the Federal authorities arising in this field of compulsory subscription, on the whole the people, in their customary law-abiding spirit, accepted these instances of arbitrary and illegal interference with their civil liberties with a surprising degree of equanimity. Admiration for the general spirit of patriotism thus shown obscures the conclusions which a law philosopher should draw from this attitude on the part of both Americans and aliens. It may conservatively be said, however, that the complaisance with which the whole people submitted cheerfully and voluntarily to extra-legal restrictions of this character and to interference with their normal civil liberty is without precedent in the records of organized society.[1]

[1] Other and more noteworthy illustrations of this spirit of patriotism are, of course, found in the universal acquiescence by the public in the regulations promulgated by the Fuel Administration for heatless days and gasolineless Sundays.

The respective claims of the leaders of the farmers' movements and their political opponents and the charges and countercharges in conflicts between employers and employees were matters of daily concern to the Department of Justice throughout the war. A similar but more intense form of anxiety was caused by an organization of a very different type—the I. W. W.—whose activities pervaded the entire Pacific coast, as well as the mining States of the West and Northwest. The well-known character of this movement and the menace which it offers to established order precludes necessity for extended comment here. The conflict between its members and the forces of law and order was acute and continuous. It is doubtful whether it had any degree of German support. Its motives were primarily economic rather than seditious. This was illustrated by the success achieved by Col. Disque in dealing with the I. W. W. in the spruce forests, where the members recruited by him and appealed to on the basis of reason accomplished a full measure of success in lumber production. Nevertheless, the logical result of the activities of this organization being to cripple industries, those activities in many instances clearly fell within the prohibition of the Federal law and were so prosecuted. The demand from the general public for a general policy of discrimination against and repression of this organization was most insistent and emphatic; but, adhering to the general attitude above discussed, the Attorney General steadfastly insisted upon keeping his department within the bounds of its lawful authority, and, so far as was humanly possible, punished these activities upon a basis of individual guilt.

The foregoing is a summary review of the more trying conditions which embarrassed the war activities of the country and imposed the heaviest burden upon the Department of Justice.

It was with the country in the atmosphere above described that the laws affecting "free speech" received the severest test thus far placed upon them in our history. As already stated, we entered the war with substantially no Federal laws attempting to regulate the conduct of the individual during war time other than the Treason statute and the Internment statute. The first statute enacted by Congress which in any way affected utterances by the individual was not directed against disloyal utterances as such. On the contrary, it was a statute whose sole aim was to protect the process of raising and maintaining our armed forces from the dangers of disloyal propaganda. This statute was section 3 (Title 1) of the so-called Espionage act, reading as follows:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements, with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

This was supplemented by section 1, Title XII, which aimed to protect the Postal Service by declaring nonmailable all written or printed matter which violated any provision of the espionage act.

Throughout the most critical part of our participation in the war and until the law was amended in May, 1918, the few sentences above quoted constituted, with the Treason statute, the entire bulk of law affecting in any way the unlimited exercise of speech. This law prescribed no abstract standard of patriotism, loyalty, or obedience to be observed on the part of the citizen. It was aimed solely to protect the work of raising and maintaining our Army and Navy, and drew its authority solely from the provisions of the Constitution, which empowered Congress to raise and maintain armies. (Art. I, sec. 8, subd. 12 et seq.) In actual operation, and laying aside the charge of conspiracy for its violation, the first clause of this section was rarely used. The second clause, that prohibiting attempts to cause insubordination, mutiny, etc., was oftener used, and the third clause, that forbidding interference with the recruiting and enlistment service, was constantly used. The evolution of this section presents an interesting example of the process of judicial interpretation so commonly characteristic of American courts. At the outset, for instance, there was uncertainty as to whether the phrase "military and naval forces" in the second clause included only men actually mustered in or whether it included also men within the draft ages. This question is now before the Supreme Court, but with substantial unanimity the district courts have taken the broad view that, considering the general purpose of Congress, this phrase must be held to include at least those registrants between the ages of 21 and 30; many judges going further and holding that it included all men subject to the draft.

Similarly there was at first uncertainty as to whether the phrase "recruiting and enlistment service" included only the technical service so known or whether this phrase was intended also to protect the operation of the selective-service act. A substantial majority of the district courts have taken the broader view.[1] The standard by which conduct was found to be in violation of the prohibitions of this section was again judicial, not legislative in creation. With a degree of unanimity which is extraordinary the lower courts have insisted that this slenderly worded section was broadly intended by Congress to include every form of activity, by speech or conduct, which was willfully intended by direct or indirect means to obstruct the work of raising and maintaining the National Armies.

The proper construction of this section meant that it could not reach certain types of propaganda opposing the flotation of war loans. The Attorney General, therefore, with the concurrence of the Secretary of the Treasury, requested that Congress amplify the phraseology of the section to include efforts intentionally made for the purpose of discrediting and interfering with the flotation of Government war loans, and requested also that the last clause of the section be clarified by including specifically "attempts" to obstruct the recruiting and enlistment service. Upon the presentation of these brief amendments in the form of a proposed bill, the Senate Committee on the Judiciary, acting on its own motion, decided upon a course which resulted in the declaration by Congress of a changed and different policy aimed at the suppression of all utterances of a disloyal character. Taking as its basis the main features of a law passed by the Legislature of the State of Montana, Congress evolved

[1] Upheld recently by the Supreme Court (Schenck *v.* U. S.).

and adopted an amendment to section 3, colloquially called the "sedition law," which became effective May 16, 1918.[1]

There had been much demand for such a law, based on the argument that the war was a national enterprise, and that the Federal, not the local, authorities should properly be charged with suppressing all types of disloyal utterances. The framers of the amendment undoubtedly had in mind also the fact that this country, except for the original section 3, had no statute effective against the so-called German propaganda. The break up of Russia, due to this cause, the disaster to the Italian armies at Caporetto, and the revelation of the attempts against France in the Bolo case all combined to awaken this country to the danger to civilization itself from the operations of what Mr. Gilbert Murray has called "the monstrous and debauching power of the organized lie."

The broad and sweeping character of this amendment is obvious. Because of many cases now pending under the new law, no comment is here made upon the wisdom of this enactment or upon the constitutional questions which it suggests. The enactment did, however, throw upon the law machinery of the Federal Government a great burden which it was ill adapted to assume, and it increased the tendency of local prosecutors to transfer their responsibilities to the Federal officials. In the 88 districts, even where the standard equipment was amplified by the employment of special counsel, it proved well nigh impossible for the law officials to keep abreast of the complaints under this statute and the result everywhere tended to encourage impatience with the action of civil tribunals, both State and Federal. Prior to the enactment of this section isolated disloyal utterances had been treated in many parts of the country as incitements to disorder and had been summarily disposed of under State or local laws providing punishment for disorderly conduct. While

[1] SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by the United States or to the United States, and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite, or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, [illegible] publication or language spoken, urge, incite, or advocate any curtailment of [illegible] in this country of any thing or things, product or products, necessary or [illegible] in the prosecution of the war in which the United States may be engaged, with [illegible] to cripple or hinder the United States in the prosecution of [illegible] and whoever shall willfully advocate, teach, defend, or suggest the doing of any [illegible] of [illegible] in [illegible] and whoever shall by word or act sup[illegible] the cause of any country with which the United States is at war or by word or act [illegible] the cause of the United States therein, shall be punished by a fine [illegible] $10,000 or imprisonment for not more than 20 years, or both. *Provided*, [illegible] official of the United States Government who commits any dis[illegible] or disloyal language, or who, in an abusive and violent [illegible] Navy or the flag of the United States, shall be at once [illegible] Any such employee shall be dismissed by the head of the [illegible] in which the employee may be engaged, and any such official shall be dis[illegible] by the authority having power to appoint a successor to the dismissed official.

this policy must have resulted in many instances in a rather generous interpretation of the local laws relating to disorderly conduct, there can be no doubt of the effectiveness of thus dealing with offenses of this character. This was clearly shown by the results obtained, as, for example, in several cities of this State which came under the writer's close observation, viz, New York, Buffalo, and Rochester. The difficulty, from an administrative standpoint, with the new sedition statute was that it covered in all degrees of conduct and speech, serious and trifling alike, and, in the popular mind, gave the dignity of treason to what were often neighborhood quarrels or barroom brawls. Whether this was offset by the admittedly efficacious and stern justice administered through the Federal courts is a question for the future to decide.

We had a clear idea of the results which would follow from the enforcement of this statute, and immediately upon its enactment the Attorney General issued to all United States attorneys a circular, warning Federal law officers against dangers of abuse under this law.[1]

The general publicity given the statute through the newspapers and in many cases through employers who circularized their employees with copies of the act (calling attention to the dangers of strike activities), fanned animosities into flame, vastly increasing the amount of suspicion and complaints throughout the country. This, in turn, resulted in a large increase in the amount of prosecutions, backed up by strong local patriotic sentiment. Up to the time that this statute went into practical operation the United States attorneys throughout the country, except in genuine cases of treason, had each acted as the supreme law official of his district, exercising on his own account full discretion in all matters as to prosecution.

As soon as the amended act began to come before the courts for construction, however, wide divergence appeared in the theories entertained by the various prosecuting officials, evidencing danger of conflict in interpretation of the act, to say nothing of the graver dangers which had already been apprehended and which we had sought to guard against by the issue of the circular last mentioned. Entertaining a clear view as to the increase of these dangers, the Attorney General, in October, 1918, issued a circular which had the effect of ruling that no more cases should be submitted to grand juries under the sedition act without first submitting a statement of the facts to the Attorney General and receiving by wire his opinion as to whether or not the facts constituted an offense under the act. It is conservative to say that the wisdom of this action has been demonstrated beyond question and, had the war continued, it would have been more emphasized.

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[1] TO ALL UNITED STATES ATTORNEYS: Inclosed is a copy of the amendment to the espionage act just passed by Congress and approved by the President. As you will note, it greatly extends the scope of the espionage act and covers many different types of disloyal expressions.

The prompt and aggressive enforcement of this act is of the highest importance in suppressing disloyal utterances and preventing branches of peace. It is also of great importance that this statute be administered with discretion. It should not be permitted to become the medium whereby efforts are made to suppress honest, legitimate criticism of the administration or discussion of Government policies; nor should it be permitted to become a medium for personal feuds or persecution. The wide scope of the act and powers conferred increase the importance of discretion in administering it. Protection of loyal persons from unjust suspicion and prosecution is quite as important as the suppression of actual disloyalty.

All cases which clearly violate this law should be promptly and vigorously prosecuted, but care should be exercised to avoid unjust arrests and prosecutions.

The issue of this circular typifies the great load of anxiety which we bore throughout the war in endeavoring to preserve without stain the domestic administration of law; and it is also suggestive of the immense pressure brought to bear throughout the war on the Department of Justice in all parts of the country for indiscriminate prosecution demanded in behalf of a policy of wholesale repression and restraint of public opinion. Because of the directions given in this circular it has been possible to make a distinction between genuine cases deserving of prosecution and those "clamor" cases which were essentially *amicus*, and the Attorney General has not hesitated to weed out and dismiss many prosecutions of the latter character.

Thus far, all of the cases heard on appeal have arisen under section 3 as it stood prior to amendment. Invariably defendants have challenged the constitutionality of that section under the loose claim that, as interpreted by the courts, it conflicted with the provisions of the first amendment providing that Congress should make no law abridging freedom of speech or of the press. Recent decisions of our courts have intimated that the restraints which it was here intended to prohibit Congress from making were laws of prevention and suppression having a restraining effect prior to utterance or publication. (Patterson *v.* Colorado, 205 U. S., 454, 462.) This ruling is, of course, consonant with the observations of Blackstone and other commentators on the common law. Thus far, however, the Government has not advanced this particular contention in support of the section, for the reason that the cases thus far pressed by it on appeal have been cases involving direct incitement to disobedience of law. The Supreme Court has already upheld the constitutionality of the selective service act and has also affirmed the judgments of conviction against several persons who conspired to dissuade men from registering or doing military duty.[1]

It has been our contention that Congress has likewise full constitutional power to protect the raising of our armies and that the section embraces utterances or publications which were unlawfully intended to accomplish this broad result indirectly as well as directly. We have also contended that the true criterion under the original section 3 (assuming unlawful intent to be shown) is the question of whether or not the utterances complained of would have the natural and reasonable effect of producing the result aimed at by the statute. These several contentions have received substantial approval in the lower courts.[2]

The fact that there are now immediately pending before the Supreme Court of the United States several cases directly involving the degree to which spoken utterances of a disloyal character may be treated as within the protection of the First Amendment constrains the writer from entering into a further discussion of this topic.[3]

[1] [illegible]

[2] [illegible]

[3] [illegible]

The general policy of the Attorney General toward free speech has been well understood and adhered to by his subordinates with a good deal of consistency. From the outset, recognizing that free expression of public opinion is the life of the nation, we have endeavored to impress upon our subordinates the necessity for keeping within the lines of policy established by Congress and bearing in mind at all times the constitutional guaranties. Repeatedly their attention has been called to the fact that expression of private or public opinion relating to matters of governmental policy or of a political character must not be confused with willful attempts to interfere with our conduct of the war. At all times we have had before us the dangers which follow attempts to restrain public discussion and, so far as instructions issued by the Attorney General have been concerned, they have consistently and at all times emphasized this general policy.[1]

It can not be claimed that this policy was adhered to with perfect unanimity throughout the country. In default of authoritative decisions by the Supreme Court, with 88 Federal districts, each equipped with a United States attorney and at least one district judge, and the great variety of conditions peculiar to the respective localities, it is only strange that there did not develop greater divergence in the character of prosecutions as well as the character of the decisions by the lower courts.

This being the general attitude of the Government, the chief difficulty on any trial has naturally been the question of what *quantum* of evidence would, as a matter of law, justify submitting to the jury the question of unlawful intent and the question of the reasonable and natural result of the utterance complained of. This difficulty has been greatly increased by the provisions of the amended section 3, which is still to come before the appellate courts for construction. It has been quite unnecessary to urge upon the United States attorneys the importance of prosecuting vigorously, and there has been little difficulty in securing convictions from juries. On the contrary, it has been necessary at all times to exercise caution in order to secure to defendants accused of disloyalty the safeguard of fair and impartial trials. In addition to the causes already recited there were the patriotic agitations continually being carried on by the liberty loan speakers, four-minute men, and others, all of which worked the whole country up to a pitch of intense patriotism, resulting in instinctive aversion toward anyone even under suspicion for disloyalty.

A review of the rulings of the courts on questions of evidence and a scrutiny of the charges to juries will show the future commentator that United States district judges were keenly alive to this danger. They continually emphasized constitutional rights, gave great latitude to defendants' proof and urged necessity for the dispassionate consideration of evidence. A conspicuous illustration of this fairness on the part of the Federal judiciary occurred in the recent case

[1] "A citizen is entitled to fairly criticize men and measures—that is, men in public office, whether of high or low degree—and laws and ordinances intended for the government of the people, even the Constitution of his State or of the United States; this, with a view, by the use of lawful means, to improve the public service or to amend the laws by which he is governed or to which he is subjected. But when his criticism extends or leads by willful intent to the incitment of disorder and riot or to the infraction of the laws of the land or the Constitution of this country, or with willful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guaranty of the freedom of speech." (Wolverton, J.; U. S. *v.* Ramp.)

against the I. W. W. leaders at Chicago, where, at the conclusion of a long and complicated trial, the chief counsel for the defendants publicly commended the temperateness and fairness shown them by the trial judge. It should be peculiarly a source of gratification to every lawyer to recall the dignity and fairness which in a time of crisis characterized the work of our courts in the many trials of which the Hindu case at San Francisco, the I. W. W. case at Chicago, the Masses case at New York, and the Berger case at Chicago were the most conspicuous instances. Is it too much to say that the events of these trials have given new strength to the confidence of Americans in our judicial system?

No full discussion of the subject of civil liberty could be had without giving consideration to the powers exercised by the Post Office Department in connection with printed matter alleged to be of a character in violation of the espionage act. This is particularly true because of the amendment to section 1, Title XII, of that act, embodied in "the sedition act" of May, 1918, which, in substance, conferred upon the Postmaster General power to withhold, during the war, delivery of all mail from persons or concerns upon evidence satisfactory to the Postmaster General that such persons or concerns were using the mails in violation of the espionage act. These powers of the Postmaster General were exercised by him alone; the Department of Justice had no share or part in administering them, and for that reason no discussion is here made of that field of war control.

The attitude of the Attorney General opposing the suggestion of military courts is a matter of common knowledge. That suggestion, in the light of subsequent events, now appears grotesque. Not only have we been opposed to any such idea, but our policy lay deeper. We were opposed to all and any interference on the part of the military or naval authorities with the civil rights and even the habits of the average citizen. Behind the scenes we took frequent occasion to emphasize this view which, I may add, was thoroughly approved by the Secretaries of War and Navy, respectively.

There have been, of course, weaknesses in the operation of our legal system, due chiefly to delays in trials and appeals. Others will determine how much they were due to actual defects in procedure and how much to personal frailties. One serious source of trouble was clearly due to a defect in our judicial procedure long obvious in times of peace, which during the war became a distinct source of danger. This defect was the long delay incident to hearing criminal cases on appeal and the fact that after conviction for a flagrant offense crippling the conduct of the war it was possible for the defendant to give bail, delay the hearing of his appeal by the customary methods, and meanwhile remain at large, causing in most cases great apprehension to the Federal officials as well as to the general public. In an attempt to reach this situation the Attorney General requested that United States attorneys in all serious cases urge upon the trial judge the necessity for holding defendants after conviction without bail. In several important cases the trial judges complied with this request, but beyond that nothing came of the suggestion. Several defendants convicted during the early summer of 1917 are still at large on bail, and it will probably be spring or summer before the Government can bring their cases on for argument. If we had actually

suffered from more disorder this situation would have been a serious menace. As it was, the situation gave rise to severe and legitimate criticism and was one of the chief arguments urged in favor of the establishment of special tribunals for the trial of war offenses. The defect was made the more glaring by the fact that Federal courts, both trial and appeal, met only at stated intervals; all of them were overloaded with work during the war, and delays appear to have been granted to counsel by many courts as freely as in times of peace. The war is apparently over, but perhaps this illustration may arouse some degree of interest in this oft-discussed subject of the weakness of procedure in this matter of criminal trials and appeals.

The foregoing is a bird's-eye view of the subject of civil liberty in war time as seen from the standpoint of the Department of Justice. It has not been the intention of the writer to draw any inferences from the facts recited except those which were outstanding and obvious. The ordinary procedure of our courts functioned well. The efficacy of juries as triers of fact has been once more demonstrated in a convincing manner and the highest praise is not too much for the Federal judiciary, who, with only a few exceptions, taking a broad view of the necessities of the country, still maintained the American tradition of fairness and went to extremes in enforcing consideration of the constitutional guarantees. In at least two fields—internment of noncombatant civilians and the supposed necessity for military or other special tribunals in war time—the record of this period will probably have a distinct effect upon the law of the future.

The opinion of the majority of the court in the Milligan case (71 U. S., 2) declared that:

> The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.

Attorney General Gregory and his immediate aides actively sympathized with this declaration and they were believers in the efficacy of the American system of law administration. It will be for the future to determine whether our policies were shortsighted and inadequate, or grounded in considerations of seasoned wisdom.

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